STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL MARTIN,

Plaintiff-Appellee,

v

MILHAM MEADOWS I LIMITED PARTNERSHIP and MEDALLION MANAGEMENT, INC.

Defendants-Appellants.

SC No. _____
COA No. 328240
LC No. 13-000485-NO
(Kalamazoo Circuit Court)

NOTICE OF FILING APPLICATION

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

PLUNKETT COONEY

BY: ROBERT G. KAMENEC (P35283)
Attorneys for Defendants-Appellants
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

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TO: Michigan Court of Appeals Clerk
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Clerk of the Court
Kalamazoo County Circuit Court
227 W. Michigan Ave
Kalamazoo, MI 49007

NOW COME Defendants-Appellants Milham Meadows I Limited Partnership and Medallion Management, Inc., and state that on August 30, 2016, their application for leave to appeal has been filed with the Michigan Supreme Court.

Respectfully submitted,

PLUNKETT COONEY

BY: /s/Robert G. Kamenec
ROBERT G. KAMENEC (P35283)
Attorneys for Defendants-Appellants
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

Dated: August 30, 2016

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38505 Woodward Ave., Suite 2000
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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants seek Supreme Court review of a Court of Appeals opinion which reversed in part a trial court order granting summary disposition, by which the trial court resolved all claims between all the parties. This Court has jurisdiction to consider and resolve this application pursuant to MCR 7.303(B)(1) (the Supreme Court may review by appeal a case after decision by the Court of Appeals). This Court's jurisdiction has been timely and properly invoked under MCR 7.305(C)(2)(a), as evidenced by the following:

- July 19, 2016 Court of Appeals Opinion (**Exhibit A**); and
- August 30, 2016 Application for Leave to Appeal and accompanying documents (filed within the 42-day time limit of MCR 7.305(C)(2)(a)).

STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND INDICATING THE RELIEF SOUGHT

This is a civil action arising from a 2010 incident, in which Plaintiff-Appellee Michael Martin alleges that he slipped on basement stairs in a rented townhouse and sustained permanent injuries. Mr. Martin filed suit against his apartment complex lessor, Defendant-Appellant Milham Meadows I Limited Partnership, and against its management company, Defendant-Appellee Medallion Management, Inc. asserting, inter alia, that each breached covenants under MCL 554.139 to ensure the premises were fit for their intended use and to keep the premises in reasonable repair. The trial court granted summary disposition upon determining that there existed no genuine issue of material fact on breach of these covenants, as well as determining that Plaintiff's premises liability claim was barred under Michigan's open and obvious doctrine, and that Plaintiff's claims were not properly categorized as ordinary negligence.

Plaintiff appealed by right. Although the Michigan Court of Appeals affirmed the dismissal of the premises liability claim, and rejected the assertion that the allegations were properly brought as ordinary negligence, the Court reversed the grant of summary disposition on the MCL 554.139 covenants (**Exhibit A**, Court of Appeals Opinion) (Stephens, P.J., and Beckering and Gleicher, JJ.). The Court of Appeals determined that a question of fact existed under MCL 554.139(1)(a), which requires a lessor to keep the premises "fit for the use intended by the parties." Although Mr. Martin had successfully traversed the first step, alleged to be defectively slippery, over 1,800 times, without incident, the Court of Appeals determined that the report of an expert witness created a genuine issue of material fact on whether the basement stairwell was appropriate for

everyday use given its "inherent slipperiness" as opined in the expert's report. In so ruling, the Court of Appeals did not determine whether the stairwell was fit for its intended purpose, evidenced by Plaintiff continual incident-free access to and from the basement. The Court of Appeals' failure to address, let alone resolve, this seminal question is stark error, requiring Supreme Court review. In *Allison v AEU Management, LLP*, 481 Mich 419, 430-431; 751 NW2d 8 (2008), this Court interpreted fitness under § 139(1)(a) on whether it precluded access to the premises in question. "The statute does not require any level of fitness beyond what is necessary to allow tenants to use the parking lot [the premises in question in *Allison*] as the parties intended." *Id.* at 431. Here, the evidence established without question that the premises were fit for their intended purpose because Plaintiff failed to show that the alleged defect of the first stair precluded his ability to reasonably use the stairwell to access different levels of the building. The stairway was not rendered unfit for its purpose simply because it was alleged to be slippery, through an expert's opinion. In so ruling, the Court of Appeals violated this Court's interpretation of "fit for intended use." MCL 554.139(1)(a) does not require the level of fitness beyond what is necessary to allow tenants to use the premises as the parties intended—here unequivocally established by Plaintiff's safe use of the stairwell on countless occasions.

The Court of Appeals further erred by finding a question of fact on whether the premises were kept in "reasonable repair," found in MCL 554.139(1)(b). Although this Court has not addressed this subsection of the statute, the Court of Appeals has consistently held that the obligation of reasonable repair does not require an inspection of the premises on a regular basis. Here, Plaintiff contends that the Defendants were

provided notice of the alleged slippery condition of the stairwell, through which the Court of Appeals found a question of fact on this point. Yet the intermediate appellate court did not analyze the overwhelming evidence that Plaintiff had the occasion, but did not formally complain, about the alleged slippery stair in question. The Court of Appeals compounded its error by failing to analyze whether there was any notice of the specific defect in question, namely the one step upon which Plaintiff contends he slipped, rather than the stairwell in general. By expanding the concept of notice beyond the specific defect, the Court of Appeals materially erred and wrongfully expanded the meaning of "reasonable repair" to go beyond the complained-of defect.

Defendants request this Court peremptorily reverse those portions of the Michigan Court of Appeals opinion which reversed the trial court's grant of summary disposition. In the alternative, Defendants request this Court grant leave to appeal and issue the same relief. Defendants also request the recovery of all costs and attorney fees so wrongfully sustained in pursuing this matter in the Michigan Supreme Court.

STATEMENT OF THE QUESTION PRESENTED

WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION ON MR. MARTIN'S CLAIM UNDER MCL 554.139 WHEN: (1) THE BASEMENT STAIRS WERE FIT FOR THEIR INTENDED PURPOSE; (2) THE BASEMENT STAIRS WERE KEPT IN REASONABLE REPAIR; AND (3) DEFENDANTS LACKED NOTICE OF THE ALLEGED DEFECT?

Defendants-Appellants say, "Yes."

Plaintiff-Appellee says, "No."

The trial court says, "Yes."

The Michigan Court of Appeals says, "No."

STATEMENT OF FACTS

A. Introduction.

This is a personal injury action brought by Plaintiff-Appellee Michael Martin ("Plaintiff" or "Mr. Martin") against Defendants-Appellants Milham Meadows I Limited Partnership ("Milham Meadows") and Medallion Management, Inc. ("Medallion Management") (collectively, "Defendants") arising out of an October 15, 2010 incident in which Mr. Martin fell down the basement stairs in his townhouse, located in Portage, Michigan (**Exhibit B**, Complaint). Mr. Martin filed suit against Defendants alleging premises liability, negligence, and violations of MCL 554.139, based on the condition of his basement stairs; he alleged the paint used on the stairs was slippery (*Id.*). The Honorable Alexander C. Lipsey of the Kalamazoo County Circuit Court granted Defendants' motion for summary disposition, dismissing all claims. Mr. Martin appealed. The Michigan Court of Appeals affirmed in part and reversed in part. The Court affirmed the grant of summary disposition on Plaintiff's premises liability claim, determining that there was no duty under Michigan's open and obvious doctrine. The Court also affirmed the trial court's determination that Plaintiff's negligence claim sounded in premises liability, not ordinary negligence. The Court reversed the grant of summary disposition on Plaintiff's claims of violations of the covenants of MCL 554.139. Relying primarily upon the report of Plaintiff's expert, Patrick Glon, the Court determined that reasonable minds could differ whether Martin's basement stairway was appropriate for everyday use given its inherent slipperiness, and therefore there was a question of fact on whether the premises were fit for the use intended by the parties (MCL 554.139(1)(a)). The Court also found that, for the same reason, there existed a question of material fact regarding whether Defendants'

failure to keep the premises in reasonable repair, after Martin allegedly provided notice of the steps' slippery condition (MCL 554.139(1)(b)). Underlying these determinations is the Court of Appeals determination that the trial court erroneously concluded that adequate notice of the stairs' slipperiness was lacking in this case (Court of Appeals opinion, pp 8-10).

Defendants that Mr. Martin's statutory claims fail where the basement stairs were fit for their intended purpose and kept in reasonable repair, and where Defendants had no notice of any defects in the top step on which Mr. Martin allegedly slipped.

B. Statement of material facts.

1. Mr. Martin moved into Milham Meadows and confirmed that the basement stairs were in good condition.

Milham Meadows operates an apartment and townhouse community consisting of a mix of about 300 apartments and townhomes, located in Portage, Michigan (**Exhibit C**, Beltz dep, p 11). Medallion Management provides management services to Milham Meadows. Milham Meadows and Medallion are separate entities (*Id*., p 5).

On or about July 13, 2007, Mr. Martin moved into 2424 Falcon Court, a townhouse located within Milham Meadows. At that time, Mr. Martin completed a "Move In Inventory Checklist," which, in part, documented the condition of the basement stairs (**Exhibit D**, July 2007 Move In Inventory Checklist). Mr. Martin signed the checklist, which confirmed that the basement stairs were in good condition when he moved into the unit (*Id*.).

On June 5, 2009, 14 months before the incident, Mr. Martin signed a lease for his townhouse (**Exhibit E,** 2009 Lease). His rent was subsidized by the Department of Housing and Urban Development (*Id*.). This particular lease period ran from July 1, 2009, through

June 30, 2010, and was to continue as a month-to-month lease thereafter (*Id.*). In signing the lease, Mr. Martin acknowledged that his unit was safe, clean, and in good condition (*Id.*, ¶ 6). Mr. Martin also acknowledged that Milham Meadows made no promise or representation to alter, repair, or improve the unit other than what was referenced in the Unit Inspection Report *(Id.)*.

As a practice, Milham Meadows documents any requested unit maintenance with a "Service Request" form. During Mr. Martin's tenancy at Milham Meadows, he made five service requests, none of which related to the basement stairs (**Exhibit F**, Service Request Forms). Moreover, given that Mr. Martin's rent was subsidized by the Department of Housing and Urban Development, Mr. Martin's unit was inspected annually for compliance (**Exhibit G**, HUD 100% Update Form). The January 27, 2009 and May 12, 2010 inspections of Mr. Martin's townhouse make no reference to any issues with the basement stairs (*Id.*).

2. Milham Meadows maintenance personnel were unaware of any problems with Mr. Martin's basement stairs.

Greg Newsome has been the maintenance supervisor at Milham Meadows for more than 15 years (**Exhibit H**, Newsome Affidavit). In this role, he is directly involved in the maintaining and servicing of units within Milham Meadows, including the process by which the basement stairs in townhouse units are painted (*Id.*, ¶ 3). As a practice, townhouse basement stairs are inspected when a unit is vacated and before being leased anew (*Id.*, ¶ 4). If the stairs require painting, Mr. Newsome or a member of the maintenance staff engages a painting contractor to paint the stairs as part of the overall unit painting (*Id.*). During Mr. Newsome's tenure as Milham Meadows' maintenance supervisor, the paint used on the basement stairways was a Sherwin Williams porch and floor paint — gray in color — for both interior and exterior use (*Id.*).

Mr. Newsome had personally inspected Mr. Martin's townhouse, including the basement stairs, on multiple occasions before and after his tenancy (**Exhibit H**, Newsome Affidavit, ¶ 5). The Sherwin Williams paint was used on the basement stairs in 2424 Falcon prior to and following Mr. Martin's tenancy (*Id.*). Mr. Newsome personally inspected Mr. Martin's unit after Mr. Martin's accident, on or about February 11, 2011, as part of the move out process (**Exhibit I**, Move Out Checklist). In the course of that inspection, Mr. Newsome completed the "Move Out Inventory Checklist," which documented that the basement stairs in 2424 Falcon were in good condition as of February 11, 2011 (**Exhibit H**, Newsome Affidavit, ¶ 6). Additionally, Mr. Newsome had no knowledge of Mr. Martin or any other individual ever complaining about the slipperiness of any of the stairs leading to the basements in any of the Milham Meadows townhouses (*Id.* ¶ 7). Likewise, he was not aware of any maintenance or inspection document generated during Mr. Martin's tenancy wherein Mr. Martin complained of slippery basement stairs or requested that such an issue be corrected (*Id.*).

Tom Papesh has been employed by Medallion as a maintenance technician for seventeen years (**Exhibit J**, Papesh dep, p 4). Mr. Papesh lives on site at Milham Meadows, three units down from Mr. Martin's townhouse (*Id.*, p 8). He was not personally aware that Mr. Martin complained about the steps being slippery (*Id.*, p 22). Mr. Papesh had no direct knowledge of when the basements stairs in Mr. Martin's unit were last painted (*Id.*, p 17). However, as he explained, the basement stairs are painted as a matter of course when the units are vacated "unless they look good and they're in good shape. . ." (*Id.*). Mr. Papesh explained that Medallion inspects each unit on an annual basis (*Id.*, pp 23-24). If any deficiencies are noted at the inspections, the deficiencies are addressed thereafter (*Id.*).

Moreover, tenants can call in any maintenance or service requests (*Id*., p 25). The telephone requests are written up on service request forms that are then given to the on-duty maintenance technician to address (*Id*., pp 25-26). Maintenance and/or service requests are to be completed within 24 to 48 hours of receipt (*Id*., p 26). Neither Mr. Papesh nor Scott Beltz, CEO of Medallion Management, had any recollection of Mr. Martin ever complaining of the slipperiness of the stairs leading to his basement (*Id*., p 22; **Exhibit C**, Beltz dep, pp 26-27).

3. Mr. Martin purportedly informed Milham Meadows that the bottom two basement steps were slippery.

Mr. Martin used his basement extensively while at Milham Meadows because that is where he trained with his boxing equipment (**Exhibit K**, Plaintiff's dep, pp 20-22, 34). He admitted that he used the stairway six days a week through his three-year tenancy, going down to and up from the basement to train for boxing, and he never slipped and fell on the allegedly defective first step (*Id.* at 20-22, 34). He could not recall whether the basement stairs looked freshly painted when he moved into his townhouse (*Id.,* p 42). He did not remember whether his basement stairs were painted at any point during his tenancy at Milham Meadows (*Id*., p 35). Similarly, he had no recollection of his stairs ever being repaired while living at the townhouse (*Id*.).

Mr. Martin stated that he had one conversation with a maintenance technician from Milham Meadows regarding the stairs and the technician told him to inform management (**Exhibit K**, Plaintiff's dep, p 39). Mr. Martin thus also recalled having a similar discussion with someone that he associated with Milham Meadows management regarding the slipperiness of the last two basement stairs (*Id*). He then allegedly informed Milham Meadows management — via a September 14, 2009 typed letter which he placed in the

same mail slot he uses for his rent checks — that he slipped and fell on the "last couple of steps of the basement" and requested that "some strips or something" be put on the last two stairs (**Exhibit K**, Plaintiff's dep, pp 37-38; **Exhibit L**, 9/14/2009 letter). Mr. Martin did not recall ever slipping on his stairs from the date of the September 14, 2009 letter until his October 15, 2010 fall (**Exhibit K**, Plaintiff's dep, p 42). He also did not recall that his son ever slipped on the stairs, "at least he never told me." (*Id*., p 35).

4. Mr. Martin allegedly slipped on the top basement step and fell down the stairs.

Mr. Martin fell while going down his basement stairs at some point during the evening of October 14, 2010. He testified that he assumed that, immediately prior to falling, he would have been warming up on the main floor of his townhouse; however, he had no specific recollection of his activities (**Exhibit K**, Plaintiff dep, pp 45-46). Mr. Martin confirmed that he would have slipped on the first basement step as he opened the door and began walking down the stairs: "It would have had to have been the first [step] because I remember opening up and I just remember losing balance, and that is all I remember." (*Id*., pp 47-48). In fact, upon reviewing the photographs of the basement stairway, Mr. Martin confirmed that he slipped on the first step (*Id*).

Mr. Papesh was the first person to discover that Mr. Martin had fallen down his basement stairs (**Exhibit J**, Papesh dep, p 36). Mr. Martin's neighbor told Mr. Papesh that she had heard someone yelling for help inside Mr. Martin's unit prompting Mr. Papesh to investigate (*Id*.). Upon entering the townhouse, Mr. Papesh discovered Mr. Martin at the bottom of the stairway (*Id*., p 37). Mr. Papesh called 911 and waited with Mr. Martin until EMS arrived (*Id*.). Mr. Papesh recalled Mr. Martin being entirely on the basement floor with

his head toward the base of the stairs and his legs extending into the basement (*Id*., pp 38-39).

While Mr. Papesh waited with Mr. Martin, Mr. Martin stated that he had tripped and fallen while carrying mats down the stairs (**Exhibit J**, Papesh dep, p 37). According to Mr. Papesh, there was no damage to the basement stairs and they were structurally sound (*Id*., p 20).

Alexander Moldovan was the paramedic who first responded to Mr. Martin's townhouse (**Exhibit M**, Moldovan dep, pp 12-13). Mr. Moldovan found Mr. Martin lying on his back at the bottom of the basement stairway "off to the side" towards the right side (*Id.*, pp 13-14). Mr. Moldovan recalled that Mr. Martin was wearing street clothes but he was not wearing shoes (*Id*., pp 15-16). In recounting Mr. Martin's explanation as to how he fell down the stairway, Mr. Moldovan explained, "You know, that's where it was very vague for him. He told me he had a few drinks beforehand and he just fell. He didn't really specifically tell me that he tripped over his own feet." (*Id*., p 18). Mr. Moldovan confirmed that the run report that he generated immediately after transporting Mr. Martin to the hospital documented that Mr. Martin had consumed two glasses of wine prior to falling (*Id*., pp 27-28). Mr. Moldovan clarified that the "two glasses of wine" referenced in the run report should have been in quotation marks as being directly quoted from Mr. Martin (*Id*.).

Mr. Moldovan and his partner carried Mr. Martin out of the basement on a backboard while two firefighters walked behind them in the event that anyone lost their footing while walking up the stairs (**Exhibit M**, Moldovan dep, pp 20-21). When asked whether he experienced or perceived anything that he would deem unsafe with the stairs,

Mr. Moldovan responded, "Not at all." (*Id*., p. 21). Likewise, he did not experience any slipperiness with the stairs (*Id*.).

5. Expert forensic analysis confirmed that the stairway had adequate slip resistance and that Mr. Martin likely pitched forward as opposed to slipping, causing his fall.

John Leffler, PE, Defendants' engineering expert, inspected Mr. Martin's stairs on July 1, 2014 (**Exhibit N**, Leffler report). As part of his analysis, Mr. Leffler conducted slip resistance testing on the stairs (*Id*.). Two key findings from Mr. Leffler's report were: (1) the subject step upon which Mr. Martin claims to have slipped "provides adequate slip resistance for normal pedestrian use;" and (2) the subject paint "appears to be a reasonable choice for this application." (*Id*.).

Jennifer Yaek, PE, Defendants' biomechanical engineering expert, conducted a biomechanical analysis of Mr. Martin's fall down the basement stairs (**Exhibit O**, Yaek report). Ms. Yaek's report rejects Mr. Martin's contention that he slipped and fell down the stairs (*Id*., p 6). Rather, Ms. Yaek has concluded that, based upon her analysis, Mr. Martin fell forward down the stairs (*Id*.) As her report documents, had Mr. Martin "slipped as he contends, his leading foot and base of support would have moved forward, ahead of his center of mass. His body center of mass, no longer supported would then descend rapidly such that his upper legs, buttocks, or lower back would have impacted the first steps before any other part of his body." (*Id*.). However, in Mr. Martin's case, he had no injuries to his thighs, buttocks, or lower back (*Id*.). Instead, Mr. Martin's injuries are consistent with a frontal face impact suggesting that he pitched forward as opposed to falling backwards or to the side (*Id*.). Specifically, his cervical fractures are consistent with a compression-

extension type injury that would likely have occurred when he impacted his forehead on a rigid surface after falling forward (*Id*.).

C. Statement of material proceedings.

On October 14, 2013, Mr. Martin filed suit against Milham Meadows and Medallion Management, alleging that he "slipped on the stairs leading to his basement on the premises, due to the slipperiness of the stairs, severely injuring himself." (**Exhibit B,** Complaint, ¶ 11). The complaint further alleged that "the paint used to coat the stairs leading to the basements in Milham Meadows' buildings created a dangerous hazard for tenants." (*Id*., ¶ 9). Mr. Martin alleged that the slippery steps amounted to a breach of Defendants' statutory duties under MCL 554.139 and common law duties related to keeping the premises in reasonable repair (*Id*., ¶ 12).

Defendants answered the complaint, denying liability, and after significant discovery, moved for summary disposition under MCR 2.116(C)(10). Defendants first argued that Mr. Martin's statutory claims against both Defendants under MCL 554.139 should be dismissed because Mr. Martin failed to offer any evidence that Defendants had or should have had notice that the top stair upon which he allegedly slipped and fell was in any way defective (Defendants' Motion for Summary Disposition, p 12). Although Mr. Martin alleged that he provided written notice to defendants in September 2009 advising that the "last couple of steps of the basement" were slippery, and that he had one conversation with an unidentified maintenance technician and one conversation with someone he associated with Defendants' management team, such notice did not relate to the top stair upon which Mr. Martin alleged that he slipped and fell (*Id*., p 13).

Defendants next argued that, as determined by their expert, the top stair upon which Mr. Martin alleged to have slipped was not defective and thus did not require reasonable repair (Defendants' Motion for Summary Disposition, p 13). Defendants further argued that, in any event, MCL 554.139 applies only where there is a lease between the parties, and therefore the statutory claim against Medallion Management should be dismissed because the lease was between Milham Meadows and Mr. Martin (*Id.*, p 14).[1]

Mr. Martin responded that there existed a question of fact regarding whether Defendants were liable under MCL 554.139 because Defendants failed to address the defect in the steps, even after Mr. Martin complained about it (Plaintiff's Response to Defendants' Motion for Summary Disposition, pp 8-9).[2]

Mr. Martin next argued that Defendants failed to keep the premises fit for the use intended by the parties because there were numerous aspects of the steps that made them dangerous and unfit for their primary purpose (Plaintiff's Response to Defendants' Motion for Summary Disposition, pp 10-11). In support, Plaintiff presented a report authored by Patrick Glon, report dated February 5, 2015 (**Exhibit P**), in which seven opinions were outlined, including claims well outside the slippery condition pled in the complaint (*Id.*). Only one of the opinions addressed Plaintiff's factual claim that he had slipped on the top step due to slippery paint (*Id.*). In fact, in Mr. Glon's deposition, he admitted he had never been to the townhouse in question, had not reviewed Plaintiff's deposition, and stated that

[1] Defendants also contended that Mr. Martin's claims should be dismissed because Defendants owed no duty to Mr. Martin where the step did not present an unreasonable risk of harm and was an open and obvious condition (Defendants' Motion for Summary Disposition, p 15). Finally, Defendants argued that the negligence claim should be dismissed because they had no notice of the allegedly defective condition (*Id.*, p 18).

[2] Mr. Martin alleged that his son and others also slipped on the steps (*Id.*, p 12).

he did not believe that Plaintiff's allegations as to how he fell were even important to his analysis (**Exhibit Q**, Glon dep, pp 76, 80-81). Moreover, Mr. Glon conceded that he had no criticism of John Leffler's findings (*Id.* at p 9).

Plaintiff also produced a Glon "Revised Report," dated February 23, 2015 (also found as **Exhibit P**), which offered three additional "opinions" that were not included in the February 5, 2015 report. Each of these theories dealt with the geometry or construction of the staircase, rather than whether it was allegedly slippery (*Id.*).[3]

Defendants replied that Mr. Martin failed to establish the requisite questions of fact (Defendants Reply Brief in Support of Motion for Summary Disposition, p 2). The top step was evaluated and determined not to be slippery. Further, although Mr. Martin alleged that the stairs were defective because of tread size, rounded nosings, low handrails and limited clearance space, etc., none of these theories supported Mr. Martin's sole factual allegation that he slipped on the top step (*Id*.).

Defendants also argued that, even assuming that the top step was unreasonably slippery, Mr. Marin failed to offer any credible evidence to refute Defendants' position that they lacked notice (Defendants Reply Brief in Support of Motion for Summary Disposition, p 2). Again, Mr. Martin alleged that he provided written notice that the bottom steps were slippery, but he now alleged that he and others slipped on the top step; there was no record

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[3] Mr. Martin further contended that the open and obvious defense did not apply to his claim for ordinary negligence, which was a separate claim from premises liability (Plaintiff's Response to Defendants' Motion for Summary Disposition, p 12). Mr. Martin next argued that, in any event, the open and obvious defense was not applicable because there were special aspects to the stairs, making them dangerous (*Id*., p 15). Mr. Martin cited the height of the steps, the lack of additive in the paint covering, lack of adhesive strip on the treads, unusual steepness, irregular narrowness of the tread, the handrail being too low, the riser heights being inconsistent, and the lack of demarcation of the tread edges (*Id*., p 17).

evidence that problems with the top step were ever reported (*Id*., pp 2-3). Defendants likewise pointed out that Mr. Martin's expert's opinions did not support his theory of liability because they did not address his claim that he slipped on the top step due to slippery paint (*Id*., pp 5-6).[4]

The trial court held a hearing on Defendants' motion on March 16, 2015. The trial court observed that Mr. Martin's note of September 14, 2009 occurred shortly after he entered into his second lease (**Exhibit R**, Tr. 3/16/2005, p 25). The trial court also referenced Mr. Martin's testimony that he spoke to a maintenance technician regarding slipperiness (*Id*.). The trial court then noted that "throughout this process, the focus has in fact been on the . . . alleged slippery nature of the stairs not on the geometry of the stairs in terms of a violation of code regarding either the tread or height of the individual stairs, in particular the top stairs, which is apparently the subject of the suit." (*Id*., pp 25-26).

Accordingly, the trial court first ruled that Mr. Martin's claim sounded in premises liability, not ordinary negligence, and that claim failed because Defendants did not have notice of any defect: "the court does not see that there was anything unusual about the stairs' condition, that the defendant had notice . . . such that it had a requirement to remedy that defect at any given time . . . while the plaintiff was a tenant in . . . the apartment unit." (Tr. 3/16/15, pp, 29, 31). The trial court further reasoned and concluded that any alleged defect was open and obvious.[5] The trial court also determined that the stairs had no

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[4] Defendants argued that Mr. Martin's tort-based claims sounded in premises liability not general negligence because Mr. Martin has not identified any overt act by Defendants or their employees that caused the allegedly slippery condition of the stair (*Id*.).

[5] "The plaintiff traversed these stairs on numerous occasions. In fact, the plaintiff by his own testimony testified to having slipped at least once on these stairs, which from that

(cont'd next page)

special aspects because they did not involve a uniquely high likelihood of harm or severity of harm "given our everyday experiences with stairs in all kinds of buildings, including this one." (*Id*.).

With respect to Mr. Martin's claim under MCL 554.139, the trial court noted that "[t]he duty to repair, again though, goes to notice… the court does not believe that the plaintiff provided adequate notice of the need for repair of the stairs." (Tr. 3/16/15, p 35). Additionally, "[t]he issue with regard to the tread and height of the stairs was not mentioned by the plaintiff at the time of the filing of this action or even, quite frankly, in the informal notice that he provided to defendant. And, therefore, the court . . . does not feel that it is part of this discussion." (*Id*., p 36). The trial court also agreed that any statutory claim against the property management company, Medallion Management, Inc. failed as a matter of law because it was "not a party to the lease" and "would not be a proper defendant under 554.139." (*Id*., p 37). On March 27, 2015, the trial court entered an order granting Defendants' motion for summary disposition for the reasons stated on the record (**Exhibit S**, 3/27/15 Order Granting Defendants' Motion for Summary Disposition).

Mr. Martin then moved for reconsideration, arguing that Defendants had actual and constructive notice of the hazardous condition because Mr. Martin talked to a maintenance man, informed the resident manager, and wrote a letter (Plaintiff's Motion for

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> standpoint would obviously argue in favor of him taking special precaution, if in fact he believed that they were a dangerous obstacle for him and if he believed that the defendant needed to address it… ."

(Tr. 3/16/15, pp 31-32).

Reconsideration, pp 3-4). Mr. Martin next argued that the other allegedly dangerous conditions of the stairs should be considered because, upon filing of the lawsuit, "all the dangers of the steps contributing to Plaintiff's fall were not yet known." (*Id*., pp 5-6). Mr. Martin concluded that his complaint properly put Defendants on notice that he was alleging that the stairs were unsafe and caused his injury (*Id*., p 6). He asked to be able to amend his complaint to be more specific if the trial court deemed it necessary (*Id*., pp 6-7).

Mr. Martin next argued that he presented a genuine issue of material fact by bringing forward specific evidence that contradicted the HUD inspection and maintenance checklist, thus creating a question of fact regarding whether Defendants kept the stairway both "fit for the use intended by the parties" and "in reasonable repair." (Plaintiff's Motion for Reconsideration, p 9). He further insisted that because Defendants designed and constructed the stairs and then painted them with slippery paint, these actions provided a basis for Mr. Martin's ordinary negligence claim (*Id*., p 12).

On June 16, 2005, the trial court entered an order denying Mr. Martin's motion for reconsideration, finding that the motion presented the same issues already ruled on by the court, and further, Mr. Martin failed to demonstrate palpable error (**Exhibit T**, 6/16/15 Order Denying Motion for Reconsideration).

Mr. Martin appealed by right to the Michigan Court of Appeals. As indicated, that Court affirmed in part and reversed in part. With respect to the rulings challenged in this application, the Court found that there existed a question of fact on whether there was adequate notice of the stairs' slipperiness provided to the Defendants (**Exhibit A**, Court of Appeals opinion, p 8). Even though Mr. Martin advised that he fell on the bottom steps, the court determined that notices of slipperiness applied to the condition of the entire

stairway, not just the step in question (*Id.*). The Court rejected the notion that the notifications were too remote in time to place Defendants on notice of a dangerous condition, and emphasized that perhaps Mr. Martin was tired of complaints going "unheeded" and gave up, thus explaining his failure to reduce his complaints, demonstrating notice, to the service request forms in question (*Id.* at p 8). With respect to the claim that the stairs were not fit for use intended by the parties, the Court found that Mr. Glon's report created a genuine issue of material fact because "[r]easonable minds could differ regarding whether Martin's basement stairwell was appropriate for everyday use given its inherent slipperiness as described in Glon's report." (*Id.* at pp 9-10). The Court rejected the notion that Mr. Martin's repeated ability to use the stairway without incident eliminated any question of fact on whether the premises were fit for their intended use "By standing alone a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use." (*Id.* at p 10). Finally, the Court found that a question of material fact existed regarding whether Defendants failed to keep the premises in reasonable repair, after they were allegedly provided notice of the steps' slippery condition, citing to the Glon Report, once again (*Id.* at p 10).

This application followed.

THE NEED FOR SUPREME COURT REVIEW

The granting of leave to appeal is left to the sound discretion of the appellate court. *Armstrong v Commercial Carriers, Inc,* 341 Mich 45; 67 NW2d 194 (1954); *Sweitzer v Littlefield*, 297 Mich App 355; 297 NW2d 522 (1941). Pursuant to MCR 7.305(B), the application must show one or more of the factors justifying Supreme Court review, including whether the issue involves a legal principle of major significance to the state's jurisprudence (subsection (3)) and whether the decision of the Court of Appeals is clearly erroneous, will cause material injustice, or conflicts with a Supreme Court decision or another decision of the Court of Appeals (subsection (5)(a) and (b)).

Since this Court's 2008 release of *Allison*, there have been many Court of Appeals opinions addressing how to determine and the scope of the covenant that premises be fit for the use intended by the parties under MCL 554.139(1)(a). According to Defendants' review, the clear trend in the Court of Appeals—published and unpublished cases—is to determine whether the defective condition precluded access intended by the party, but nothing more than the level of fitness beyond what is necessary for the expected use of the premises. As explained in the following pages of this application, with respect to a claimed defect of a step or a stairway, the courts have looked to whether the condition complained of precluded the ability to use the stairway to access different levels of the building. A stairway is not rendered unfit for its purpose simply because of a presence of some condition that requires a careful navigation of the steps. That trend is shattered by the Court of Appeals opinion here, by which the Court summarily dismisses the fact that Plaintiff had repeatedly navigated the alleged dangerous step in going down to and up from his basement. In fact, the uncontroverted evidence is that Plaintiff did so twice a day, six

days a week, for the three years of his tenancy. This equates with over 900 encounters with his own stairwell, and double that amount if measured from going down as one trip, and coming back up, as another. Yet the Court of Appeals here summarily dismissed this analysis, stating in stark terms:

> "By standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use."

(**Exhibit A**, Slip Opinion, p 10). This is in dramatic contrast to this Court's statement in *Allison* that MCL 554.139(1)(a) does not require any level of fitness beyond what is necessary to allow tenants "reasonable access" to the basement. In Defendants' view, the Court of Appeals did not apply this Court's test in *Allison* for determining whether the premises were fit for the use intended by the parties. Since this Court has not examined the scope of MCL 554.139(1)(a) since *Allison*, appellate court review is both valuable in this case and necessary for the continued jurisprudence of the state of Michigan to properly interpret legislative covenants.

Supreme Court review is also justified by the Court of Appeals unwarranted decision that it would define the defect, and necessary inquiries about the defect (such as notice) in the context of the stairwell itself, rather than the alleged defective stair. This is especially true in the context of notice, by which the Court of Appeals found a question of fact, but could not unearth any record support for a complaint about the particular stair in question.

Finally, the Court of Appeals altogether failed to affirm the dismissal of the management company here, Medallion Management, Inc., which is neither the lessor or licensor, and therefore falls outside the gambit of MCL 554.139.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION ON MR. MARTIN'S CLAIM UNDER MCL 554.139 WHEN: (1) THE BASEMENT STAIRS WERE FIT FOR THEIR INTENDED PURPOSE; (2) THE BASEMENT STAIRS WERE KEPT IN REASONABLE REPAIR; AND (3) DEFENDANTS LACKED NOTICE OF THE ALLEGED DEFECT

A. Standard of review and supporting authority.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 343 (2004). This Court reviews a motion brought under this rule by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law (*Id*.). A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the non-moving party. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

B. Introduction – summary.

The trial court properly granted summary disposition to Defendants on Mr. Martin's claims under MCL 554.139. The basement stairs were fit for their intended purpose because Mr. Martin was able to successfully traverse the first step for over three years without incident and the staircase in its entirety the year before his accident. The Court of

Appeals materially erred by dismissing this dispositive point. Additionally, the stairs were kept in reasonable repair because they were not damaged or defective in any way, and further, Mr. Martin never notified Defendants that the top step was slippery or suffered from any other defective condition.

C. Governing law.

"[O]wners of leased residential property are obligated by statute to maintain their premises in reasonable repair and in compliance with health and safety laws of the state and local government for the protection of invitees or licensees." *O'Donnell v Garasic*, 259 Mich App 569, 580; 676 NW2d 213 (2003). MCL 554.139 governs the lease of residential premises and provides as follows:

> "(1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein."

This statute provides a specific protection to lessees and licensees of residential property in addition to any protection provided by the common law. *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 128; 782 NW2d 800 (2010). Moreover, the covenants apply only to the lessor or the licensor. MCL 554.139(1).

"The lessor's duty under MCL 554.139(1)(a) [to keep fit for intended purpose] applies to 'the premises and all common areas,' while the lessor's duty under MCL 554.139(1)(b) [duty of reasonable repair] applies only to 'the premises.' " *Allison*, 481 Mich at 432. Under MCL 554.139(1)(a), "the lessor effectively has a contractual duty to keep the area fit for the use intended by the parties." *Hadden*, 287 Mich App at 128 (internal punctuation and citation omitted). For example, the *Allison* Court addressed an apartment building's parking lot and held that "[t]he statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes." *Allison*, 481 Mich at 430.

The principles set forth in *Allison* "apply to stairways." *Hadden*, 287 Mich App at 130. The primary purpose or intended use of a stairway "is to provide pedestrian access to different levels of a building or structure." *Id*. Thus, "[a]s with a parking lot, MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants 'reasonable access' to different building levels.' " *Id*.

With respect to the duty to keep the premises in reasonable repair, the landlord must repair all defects of which he knew or should have known. *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978). MCL 554.139(1)(b) does not "impose a duty upon the landlord to inspect the premises on a regular basis to determine if any defects exist." *Id*. Rather, a landlord must "repair any defects brought to his attention by the tenant or by his casual inspection of the premises." *Id*. at 431. "'Defect' is defined as 'a fault or shortcoming; imperfection.' Damage to the property would constitute an imperfection in the property that would require mending. Therefore, repairing a defect equates to keeping the premises in a good condition as a result of restoring and mending damage to the property." *Allison*, 481 Mich at 434, quoting Random House Webster's College Dictionary (1997).

Finally, a defendant cannot use the doctrine of open and obvious to avoid liability when the defendant has a statutory duty under MCL 554.139. *Allison*, 481 Mich at 425.

D. Argument.

1. MCL 554.139 does not apply to the management company, Medallion Management, Inc.

Defendants argued in the trial court, and the trial court agreed, that the claims against Medallion Management fail in any event because MCL 554.139 applies only where there is a lease between the parties. The lease here is between Mr. Martin and Milham Meadows (**Exhibit E**, 2009 Lease). "The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Allison*, 481 Mich at 425. See also *Lowery v Brookline Mgt Co*, No. 290875, 2010 WL 2977141, at *2 (Mich Ct App July 29, 2010) (unpublished) (**Exhibit U**) (the statutory protection of MCL 554.139(1) is based on the existence of a lease, therefore,

where the lease was between the plaintiff and the apartment complex, summary disposition for the property management company was proper on the statutory claims). Mr. Martin did not challenge this ruling on appeal. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Accordingly, the Court of Appeals erred when reversing as to Medallion Management, Inc., for its asserted liability under MCL 554.139(1), for subsections (a) and (b).

2. The basement stairs were fit for their intended purpose.

The basement stairs were fit for their intended purpose because Mr. Martin was able to traverse the first step for over three years – at least 1,800 encounters - without incident and he successfully navigated the staircase in its entirety throughout the year before his accident. Under *Allison*, Plaintiff always had reasonable access to his basement, notwithstanding the alleged slippery condition of the top step. MCL 554.139(1)(a) merely requires the lessor to maintain the premises in a condition that renders those premises fit for their intended purpose – to allow access to a different level of the structure (the basement). The statute does not require any level of fitness beyond what is necessary to allow tenants to use the stairway as installed. *Allison*, 481 Mich at 430-41. The Court of Appeals erred by finding a question of fact on the breach of this covenant.

The primary purpose or intended use of a stairway "is to provide pedestrian access to different levels of a building or structure." *Hadden*, 287 Mich App at 130. "MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants 'reasonable access' to different building levels." *Id*. Specifically in *Hadden*,

upon which Plaintiff relies, the Court found "[r]easonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use." *Id.* at 124. By contrast, however, "as long as the premises are still fit for their intended purpose, no liability can attach." *Garland v Hartman & Tyner, Inc*, 2014 WL 3612700, at *2 (Mich Ct App No. 313120, July 22, 2014) (unpublished) (**Exhibit V**).

A plaintiff's repeated use of the premises without accident or injury establishes that the premises are fit for their intended purpose. For example, in *Gumina v 90 LLC*, 2014 WL 265534, at *5 (Mich Ct App No. 312841, January 23, 2014) (unpublished) (**Exhibit W**), the Court concluded that a walkway was fit for its intended use, because, prior to her accident, the plaintiff had been "able to use the same walking path multiple times without incident." The Court reached the same conclusion in *Belanger v Simply Better Mgt Co, LLC*, No. 12-14516, 2013 WL 3771352, at *6 (ED Mich July 18, 2013) reconsideration den No. 12-14516, 2013 WL 3936503 (ED Mich July 30, 2013) (unpublished) (**Exhibit X**), where the plaintiff sued his landlord claiming that he was injured when he tripped and fell on his way to his vehicle from his apartment complex's dumpster area because of a hole in the pavement abutting the curb. The court held that, even if the plaintiff could establish that walking to and from the dumpster and the apartments was the primary intended use of the roadway, the roadway was still fit for such intended use. *Id*. The court reasoned, "at his deposition, [the plaintiff] testified that tenants took their trash to the dumpster because trash bins were not otherwise provided. Thus, [the plaintiff] and the remainder of

[d]efendant's tenants were all accessing the dumpster without incident prior to, and after, his fall." *Id.*

The same result must follow here. Mr. Martin admitted that he used his stairway extensively throughout his three-year tenancy. He went down to and up from the basement six days a week to train with his boxing equipment and he had never before slipped and fallen on the first step (**Exhibit K**, Plaintiff's dep, pp 20-22, 34).[6] Although Mr. Martin claims that he and others had previously slipped on the bottom step[7], he had not slipped on any part of his basement stairs for more than a year before his accident (*Id*., pp 35, 42). Clearly then, the stairs were fit for their intended use.

The Court of Appeals altogether punted on applying the *Allison* test to the facts. First, it made an assumption unsupported by the proofs: the stairs could be successfully navigated by "wearing certain shoes or treading slowly and carefully," such that the user "may avoid slipping." (**Exhibit A**, Slip Opinion, p 10). Then, the Court of Appeals effectively negated the *Allison* test by pronouncing:

> "But standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use."

Id. The entire point of *Allison's* discussion of this issue is that the covenant of fitness is limited, and defined by the ability of the user to obtain reasonable access to the different

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[6] Assuming six days a week for 52 weeks (312) for three years (986), and each visit requiring 2 encounters with the step. the total number of times Plaintiff successfully navigated the alleged dangerous step was 1,872.

[7] Although Mr. Martin testified that he did not recall his son ever slipping on the stairs (**Exhibit K**, Plaintiff's dep, p 35), Mr. Martin produced an after-the fact affidavit from his son alleging that others slipped on the first step (See Plaintiff's brief on appeal, p 1 and Plaintiff's Exhibit 3). Notably, however, there is no evidence – or even a claim by Mr. Martin – that Defendants were informed of these other alleged incidents.

levels of the structure. Such access was demonstrated conclusively by more than 1,800 successful trips either up or down the stairs, without incident occurring because of the allegedly defective top stair. The Court of Appeals analysis is exactly backwards and thus reversibly flawed.

In its opinion, the Court of Appeals cited to one portion of expert Glon's report, entitled "Painted Staircase," in which he opines that steps are more slippery when painted than when the wood is bare, that the paint on the staircase is normal paint that does not contain any "slip-resistant" additives, and that measures could have been taken to provide "a very simple and inexpensive remedy," which included anti-skid adhesive tape, inexpensive pre-shape metal or rubber strips or corners to the nosing, and the addition of nosing strips altogether (**Exhibit P**, Glon's Report, p 11 of 13; **Exhibit A**, Slip Opinion, p 9). The Court of Appeals takes this report and concludes that the stairs therefore do not provide "reasonable access" to building levels because they may not be appropriate for everyday use given the inherent slipperiness described in Mr. Glon's report. Yet Plaintiff himself navigated these steps over 1,800 times without difficulty (and more precisely, navigated the alleged defective nature of the first step). The Court of Appeals' response to this point is simply that, "Indoor steps are not supposed to be slippery." *Id*. Once again, this is a significant retreat from the *Allison* test, by which the statute does not require any level of fitness beyond what is necessary to allow access to a different level of the building, namely to and from the basement.

In the Court of Appeals, Mr. Martin relied on additional testimony of his engineering expert, Patrick Glon, who opined that the stairs suffered from numerous conditions other than slipperiness caused by paint, which rendered them unfit for their intended purpose,

including a rounded nosing on the top tread, a shorter top tread, inconsistent riser heights between steps, inadequate headroom clearance at the bottom of the steps, irregular narrowness of the tread, the handrail being too low, the riser heights being inconsistent, and the lack of demarcation of the tread edges (Plaintiff's brief on appeal, pp 8-13). None of these theories addresses the *only* alleged defect – slipperiness (and, as confirmed by Plaintiff in his deposition, of the first step). Plaintiff relied on *O'Donnell*, 259 Mich App at 576-78, a premises liability case which did not address statutory duties, where that Court found a question of fact regarding whether a stairway leading to a loft was unreasonably dangerous. In that case, the alleged defects in the stairs were, *inter alia*, an uneven handrail, usually steep steps, and most notably, an open space between the loft guardrail and the edge of the steps. While attempting to descend the stairs in the dark, the plaintiff "stepped down with her left foot onto the first step, searched for the second step with her right foot, but stepped into space and fell to the floor." *Id*. at 572.

Conversely, in this case, regardless of these newly developed theories for why the stairs were unfit for their intended purpose, such alleged defects were not the cause of Mr. Martin's fall. Mr. Martin clearly testified that he slipped on the first step (**Exhibit K,** Plaintiff's dep, pp 47-47). In any event, as discussed, Mr. Martin used his basement stairs six days a week for over three years without slipping on the first step and had not slipped on any other part of the stairs for more than a year before his accident, thus demonstrating that the stairs were fit for their intended purpose. *Gumina*, 2014 WL 265534, at *5; *Belanger*, 2013 WL 3771352, at *6.

Michigan case law discussing whether stairs are unreasonably dangerous also lends support to Defendants' position. In *Carruthers v Haley,* 2010 WL 2077292, at *1 (Mich Ct

App No. 290707, May 25, 2010) (unpublished), after living at the defendant landlord's house for three months, the plaintiff allegedly fell on the basement steps, which were, as in this case, the only means of accessing the basement. The sole issue before the Court was "whether the condition of the steps and the absence of a handrail made them unreasonably dangerous." *Id*. The parties did not dispute that the plaintiff knew about the condition of the steps, as is the case here, where Mr. Martin had lived in his unit for three years; hence the landlord only owed the plaintiff a duty if the stairs were unreasonably dangerous. *Id*. at n 2 citing *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 385 (2001).

The Court noted that "under Michigan law, it is well established that steps need not be 'foolproof.'" *Carruthers*, 2010 WL 2077292, at *2, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). Thus, in that case, the absence of a handrail did not create an unreasonably dangerous condition, "even if there are other common irregularities such as steepness, ice, slanted treads, dirt, etc.," *Id*. at *2, the same types of additional defects Mr. Martin cites here. The Court then rejected the plaintiff's "effectively unavoidable" argument:

> "[Plaintiff] emphasizes that the steps were the only way into or out of the basement, and argues that unavoidability alone is sufficient to state a claim. This, however, is not the law. There must be an unreasonable risk of harm present, and here there was not. *Were we to agree that the steps might have been unavoidable, the harm was not*, as evidenced by the fact that the steps were traversed numerous times with no harm resulting."

Id. at *2 (Emphasis added). By analogy the same result must follow here. Any alleged defects in the basement stairs were known to Mr. Martin (the Court of Appeals affirmed the open and obvious finding) and he successfully encountered the first step condition over 1,800 times. Mr. Martin traversed the top step numerous times over three years with no

harm resulting, and he navigated the stairs in their entirety for an entire year before his accident without slipping or falling.

3. Mr. Martin never gave notice that the top step was slippery or suffered from any other defective condition, and no other evidence suggests that any such defects existed; thus, there is no question of fact on failure to keep the premises in reasonable repair.

Mr. Martin cannot establish that Defendants breached their duty to keep the premises in reasonable repair because Mr. Martin never gave notice that the top step was slippery or suffered from any other defective condition, and no other evidence suggests that any such defects existed. The Court of Appeals erred by examining the issue of notice without specification to the actual, alleged defect, the slippery first step.

Defendants' duty is to repair all defects of which they knew or should have known. *Raatikka*, 81 Mich App at 430. There is no duty to inspect; rather, a landlord must "repair any defects brought to his attention by the tenant or by his casual inspection of the premises." *Id*. at 431. Accordingly, where the landlord does not know about an allegedly defective condition, there can be no liability. For example, in *Garneau v Noon*, 2011 WL 254519, at *1 (Mich Ct App No. 294846, January 27, 2011) (unpublished) (**Exhibit Y**), the plaintiff was injured when she exited her son's rental home and her feet slipped as she stood on the back stairway threshold. She fell from a height of three steps to the ground, and fractured her right ankle *Id*. The plaintiff alleged that the defendants had actual or constructive knowledge that the stairs needed to be repaired *Id*. The Court disagreed, finding that there was no evidence that the plaintiff or her son informed the defendants of the condition of the back stairs, or of the need for repair to the stairs, and no evidence that the alleged condition of the stairs was visible on casual inspection *Id*. at *2. To the contrary,

the evidence showed that neither the plaintiff nor her son, "noticed any problem with, or were concerned about, the condition of the back stairs. . . . At no time, either before or after plaintiff's fall, did she or her son ask defendants to do any work on the back stairway area." *Id*. See also *Henley v Herschelman*, 2009 WL 249397, at *3 (Mich Ct App No. 280558, February 3, 2009) (unpublished) (**Exhibit Z**) (landlords were not notified that door would not close properly, and therefore, the statutory duty to repair the defect did not arise).

In this case, not only did Mr. Martin affirmatively state that the stairs were in good condition, which is supported by other record evidence, but also, the one alleged problem with the stairs that he supposedly did report is not the problem that he asserts caused his injury. Therefore, Defendants did not breach their duty to repair. First, Mr. Martin repeatedly affirmed that his stairs were in good condition. When Mr. Martin moved into 2424 Falcon Court on July 13, 2007, he completed a "Move In Inventory Checklist," which, in part, documented the condition of the basement stairs (**Exhibit D**, July 2007 Move In Inventory Checklist). Mr. Martin signed the checklist, which confirmed that the basement stairs were in good condition at that time (*Id*.). About two years later, on June 5, 2009, Mr. Martin signed a lease for his townhouse (**Exhibit E**, 2009 Lease). In signing the lease, Mr. Martin acknowledged that his unit was safe, clean and in good condition (*Id*., ¶ 6). Mr. Martin also acknowledged that Milham Meadows made no promise or representation to alter, repair, or improve the unit other than what was referenced in the Unit Inspection Report (*Id*.).

Mr. Martin's affirmative statements regarding the condition of the basement stairs comport with other record evidence which demonstrates that the stairs had no defects evident upon casual inspection or otherwise. The Department of Housing and Urban

Development inspected Mr. Martin's unit annually (**Exhibit G**, HUD 100% Update Form). The January 27, 2009 and May 12, 2010 HUD inspections of Mr. Martin's townhouse make no reference to any issues with the basement stairs (*Id.*). Mr. Moldovan, the paramedic who first responded to Mr. Martin's townhouse when Mr. Martin fell, testified that he did not experience or perceive anything that he would deem unsafe with the stairs, including slipperiness (**Exhibit M**, Moldovan dep, pp 12-13, 21).

Additionally, John Leffler, PE, Defendants' engineering expert, inspected the stairs in Mr. Martin's unit on July 1, 2014. He concluded that (1) the top step "provides adequate slip resistance for normal pedestrian use" and (2) the subject paint "appears to be a reasonable choice for this application." (**Exhibit N**, Leffler report). Although Mr. Martin complains that this evidence should not be considered because Mr. Leffler inspected the stairs after they had been repainted (Plaintiff's brief on appeal, pp 11-12), Mr. Newsome, the maintenance supervisor, stated that the same paint was used both before and after Mr. Martin's fall (**Exhibit H**, Newsome Affidavit, ¶ 4). Furthermore, Mr. Newsome personally inspected Mr. Martin's unit on or about February 11, 2011 as part of the move out process and noted that the basement stairs were in good condition (**Exhibit H**, Newsome Affidavit, ¶ 6; **Exhibit I**, Move Out Checklist).

Nevertheless, in spite of his affirmations regarding the good condition of the basement stairs and the record evidence supporting the conclusion that the stairs lacked any defect, Mr. Martin claims to have had one conversation with a maintenance technician from Milham Meadows wherein he complained about slippery steps, and the maintenance man suggested that he inform management (**Exhibit K**, Plaintiff's dep, p 39). Accordingly, Mr. Martin also allegedly had a similar discussion with someone that he associated with

Milham Meadows management regarding the slipperiness of the last two basement stairs, but he got no response (*Id*.). Thus, Mr. Martin allegedly sent a note to Milham Meadows management on September 14, 2009, stating that he slipped "on *the last couple* steps of the basement" and requesting that "some strips or something" be installed on the last two steps (**Exhibit K**, Plaintiff's Dep, p. 37-39 (emphasis added); **Exhibit L**, 9/14/2009 letter). Again, however, Mr. Martin alleges that his injury occurred when he slipped on the first step and he could point to no record evidence that he gave notice to Defendants that the first step was defective.

In any event, Milham Meadows had no record of any service request from Mr. Martin related to the basement stairs, whether the first step or the last couple. The five requests on record instead addressed other issues such as problems with the heat, garbage disposal, toilet handle, electrical outlets, screen door, and blinds (**Exhibit F**, Service Request Forms). The last service request received before Mr. Martin's accident requested repairs to the kitchen blinds and the patio door handle (*Id*.).

Mr. Newsome had no knowledge of Mr. Martin or any other individual ever complaining about the slipperiness of any of the stairs leading to the basements in any of the Milham Meadows townhouses (**Exhibit H,** Newsome Affidavit, ¶ 7). Likewise, Mr. Newsome was not aware of any maintenance or inspection document generated during Mr. Martin's tenancy wherein Mr. Martin complained of slippery basement stairs or requested that such an issue be corrected (*Id*.). Similarly, Mr. Papesh, the onsite maintenance technician at Milham Meadows who lived three units down from Mr. Martin, was not personally aware that Martin complained about steps being slippery (**Exhibit J**, Papesh dep, pp 4, 8, 22).

Thus, Mr. Martin's only evidence of notice to Defendants is two verbal complaints that he reduced to writing – and the writing specifically identified "the last couple steps" as being slippery. The note did not identify any other problems with the basement stairs and it did not call attention to the first step, which Mr. Martin alleges is responsible for his injury (**Exhibit K,** Plaintiff's dep, pp 47-48). Although Mr. Martin's complaint states generally that the paint used on the basement stairs made them slippery and that Mr. Martin's injury occurred when he slipped on the stairs, he clearly testified in his deposition that he slipped on the ***first*** basement step as he opened the door and began walking down the stairs: "It would have had to have been the first [step] because I remember opening up and I just remember losing balance, and that is all I remember." (*Id.*). After reviewing the photograph of the basement stairway, Mr. Martin confirmed that he slipped on the first step (*Id*). Thus, any notice that Mr. Martin did give failed to call attention to the first step, which is allegedly the cause of his injury, and therefore, Defendants had no duty to repair under the statute.

In the Court of Appeals, Mr. Martin fixated on the trial court's use of the term "formal notice" which the trial court found lacking, and argues that formal notice is not required (Plaintiff's brief on appeal, p 19). The point however, is that the notice Mr. Martin did allegedly provide related to a purported defect which did not cause his injury – his note complained about the ***bottom steps*** but he testified that he slipped on the ***top step***. For the same reason, as noted above, Mr. Martin's post-hoc discussion of other alleged defects discovered by his expert, such as inconsistent riser heights between steps, inadequate headroom clearance at the bottom of the steps, and irregular narrowness of the tread (*Id*., pp 8-14), are not relevant because they were not reported and thus Defendants lacked

notice. The same is true of Mr. Martin's belated claim that his son and others slipped on the top step (See Plaintiff's brief on appeal, p 1 and Plaintiff's Exhibit 3) – he has produced no evidence that these alleged incidents were ever reported. Again, Defendants' duty is to repair all defects of which they knew or should have known. *Raatikka*, 81 Mich App at 430. Thus, where Defendants lacked notice of any defect, the trial court properly granted summary disposition to Defendants on Mr. Martin's statutory claim.

RELIEF

WHEREFORE Defendants-Appellants Milham Meadows I Limited Partnership request this Court peremptorily reverse those portions of the Michigan Court of Appeals opinion which reversed the trial court's grant of summary disposition. In the alternative, Defendants request this Court grant leave to appeal and issue the same result. Defendants also request the recovery of all costs and attorney fees so wrongfully sustained in pursuing this matter in the Michigan Supreme Court.

Respectfully submitted,

PLUNKETT COONEY

BY: /s/Robert G. Kamenec
ROBERT G. KAMENEC (P35283)
Attorneys for Defendants-Appellants
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

Dated: August 30, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL MARTIN,

Plaintiff-Appellee,

v

MILHAM MEADOWS I LIMITED PARTNERSHIP and MEDALLION MANAGEMENT, INC.

Defendants-Appellants.

SC No. _____
COA No. 328240
LC No. 13-000485-NO
(Kalamazoo Circuit Court)

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Monique M. Vanderhoff, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on August 30, 2016, she caused to be served a copy of an Notice of Filing Application, Application for Leave to Appeal, and Proof of Service as follows:

Joseph Sukup (P39898)
KELLER & KELLER
Attorney for Plaintiff-Appellee
814 Port Street, P.O. Box 7
St. Joseph, MI 49085
hkraus@2keller.com

Counsel was served via TrueFiling

Steven M. Potter (P33344)
POTTER, DeAGOSTINO, et al.
Co-Counsel for Defendants-Appellants
2701 Cambridge Court, Suite 223
Auburn Hills, Michigan 48326
spotter@potterlaw.com

Counsel was served via TrueFiling

The undersigned further states that the *Notice of Filing Application* was served upon the following courts:

Clerk of the Court Kalamazoo County Circuit Court 227 W. Michigan Ave Kalamazoo, MI 49007	**The trial court was served via U.S. Mail, all postage prepaid**
Michigan Court of Appeals	**Served via Court of Appeals' TrueFiling System**

/s/Monique M. Vanderhoff
MONIQUE M. VANDERHOFF

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